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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CELCOM COMMUNICATIONS CORPORATION OF PENNSYLVANIA,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC., CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC.

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QUESTION PRESENTED

Whether the Court below has fulfilled its primary responsibility of assessing the record to determine that the findings of the Federal Communications Commission are supported by substantial evidence in this *sui generis* case or, rather, has so far departed from the accepted and usual course of proceedings as to call for an extraordinary exercise of this Court's power of supervision.

LIST OF PARTIES
and
RULE 28.1 LISTING

No parties other than those in the caption appeared in the proceedings in the court below.[1]

The owners of Respondent Automatic Wide-Area Cellular Systems, Inc. ("AWACS") are LIN Broadcasting Corporation, which, through two wholly owned subsidiaries, owns 51 percent of the stock of AWACS, and Metromedia Company, a general partnership (successor in interest to Metromedia, Inc.), which owns 49 percent of the stock of AWACS.[2]

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[1] MCI Cellular Telephone Company and Unity Telecommunications Systems, Inc. also participated in the proceedings before the Federal Communications Commission.

[2] Petitioner Celcom Communications Corporation of Pennsylvania is wholly owned by Associated Communications Corporation. Respondent Cellular Mobile Systems of Pennsylvania is a general partnership which is owned 70 percent by Graphic Scanning Corp., through two wholly owned subsidiaries, and 30 percent by Unity Telecommunications Systems, Inc.

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BRIEF IN OPPOSITION OF RESPONDENT AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC.

The respondent Automatic Wide-Area Cellular Systems, Inc., ("AWACS"), respectfully requests that this Court deny the petition for a writ of certiorari filed by Celcom Communications Corporation of Pennsylvania ("Celcom"), seeking review of the opinion by the United States Court of Appeals for the District of Columbia Circuit in this case. *Celcom Communications Corp. of Pennsylvania v. FCC*, 792 F.2d 239 (D.C. Cir. 1986), *reh'g denied*, (Aug. 25, 1986).

STATEMENT OF THE CASE

On June 7, 1982, Petitioner Celcom Communications Corporation of Pennsylvania ("Celcom") and Respondent Automatic Wide-Area Cellular Systems, Inc. ("AWACS"), along with three other companies, filed with the Federal Communications Commission competing applications for the right to construct the nonwireline cellular telephone system to serve the Philadelphia, Pennsylvania market. At the time the applications were filed, an affiliate of LIN Cellular Communications, owner of 51% of the stock in AWACS, had an application before the Commission seeking authority to enter the Philadelphia paging market. The AWACS application disclosed also that its remaining stockholders, Radio Broadcasting Company ("RBC") and Metromedia, Inc. ("Metromedia"), had agreed that Metromedia would acquire RBC. RBC was already a major Philadelphia paging company. AWACS filed timely amendments to its cellular application to report that Metromedia and RBC had sought Commission consent to their proposed paging transaction and that the Commission, in February 1983, had granted such consent.

The cellular applications were designated for hearing in January 1983, and the hearing record was closed on May 13, 1983. During that period Celcom did not seek to present evidence concerning any potential adverse effects of the approved Metromedia acquisition of RBC. Celcom waited until more than ten months after the Commission approved that acquisition and more than three months after the issuance of the Administrative Law Judge's Initial Decision favoring AWACS, before it asked to reopen the record to consider its allegations that anticompetitive issues were presented by Metromedia's ownership of a paging company, LIN's potential entry into the paging market, and the ownership positions of those two companies in AWACS. Celcom claimed that it could not have advanced

its arguments until the purchase of RBC by Metromedia was consummated, although the purchase had been announced in AWACS' application and direct case.

The Commission rejected Celcom's request to reopen the record because, *inter alia,* it was untimely. (Celcom Petition, App. C at 38a). The Commission affirmed the Initial Decision granting the AWACS application after carefully weighing the various applicants in terms of the designated comparative criteria. It favored the AWACS application because of its thorough study of the market and implementation of the results of that study in designing its system and providing for expansion of the system.

Celcom was one of two unsuccessful applicants which sought review by the D.C. Circuit. The Court of Appeals affirmed the Commission's decision, finding that Celcom's attempt to reopen the record was untimely. That Court also rejected Celcom's argument that the cellular hearing process had become ineffectual because the Commission permits a winning applicant to make changes from its proposal to react to market demands. The Court of Appeals found generally that the argument was "without merit" (Celcom Petition App. A at 3a) and noted that it had already rejected a similar argument in reviewing another cellular case.

REASONS FOR DENYING THE WRIT

1. The issues in this case are *sui generis,* not of substantial national importance, will not have an impact on administrative law generally, and thus do not warrant review by the Court.

The contested license to provide a second cellular telephone service in the Philadelphia market offers a substantial opportunity to the prevailing applicant to render a public service and to profit thereby. This case was

decided by an Administrative Law Judge and was affirmed by the Commissioners of the Federal Communications Commission ("FCC" or "Commission") based upon standard comparative issues specially designed to award cellular licenses in the thirty largest markets. No basic qualifying issues were specified with regard to any applicant who pursued an appeal. The basic question decided in the hearing process was which of several established communications companies offered a plan calculated to provide the best cellular service to the Philadelphia area. There was no compelling national interest in the determination of the prevailing applicant.

Decisions with respect to twenty-five of the top thirty cellular markets have become final (several of the cases have already been reviewed by the Circuit Court). Apart from this case, only those cases listed in the margin are still being litigated,[1] the FCC having determined to award licenses for the smaller markets by lottery. Consequently, the specially designed comparative criteria and expedited hearing procedures for the award of cellular authorizations[2] were only utilized in the top-thirty cellular markets. Therefore, the Commission's application of those criteria cannot affect future applicants for cellular or any other type of FCC license award.

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[1] Pending appeals to the D.C. Circuit of cellular licensing decisions for other markets include: *Cellular Mobile Systems of Arizona, Inc. v. FCC*, No. 84-1542 (D.C. Cir. filed November 2, 1984); *Celcom Communications Corp. V. FCC*, No. 86-1621 (D.C. Cir. filed November 14, 1986); *MRTS-Poe of Tampa v. FCC*, No. 85-1328 (D.C. Cir. Filed June 4, 1985); *MRTS-Poe of Miami v. FCC*, No. 85-1329 (D.C. Cir. filed June 4, 1985), *motion to dismiss filed by appellant MRTS-Poe.*

[2] Petitioner did not timely challenge the formulation of these criteria and procedures which were adopted by the FCC following a rule-making proceeding.

Despite Petitioner's claims, no issues of far-reaching public importance are presented relative to the agency's decisional process. The issues in the case are *sui generis;* not of substantial national importance; and will not impact on administrative law generally. Review by this Court is not warranted.

2. The Court of Appeals fully considered and correctly decided the issues; Review by this Court is not warranted.

A. The Court of Appeals was correct in affirming the Commission's determination that Celcom was impermissibly late in raising its "anti-competitive practices" issue.

Celcom complains that the Commission and the Court of Appeals unfairly rejected its anti-competitive contention as untimely. Celcom's contention was based upon Metromedia's entrance into the Philadelphia paging market by virtue of its acquisition of Radio Broadcasting Company (RBC), an orginal AWACS stockholder. Celcom contended that this acquisition compromised paging business competition between Metromedia and the other AWACS stockholder, LIN[3] (Celcom Petition at 12-16). The Commission found, *inter alia,* that Celcom had attempted to raise the issue too late in the comparative proceeding. *Celcom Communications Corp. of Pennsylvania* ("Final Decision"), 58 Rad. Reg.2d (P&F) 1219, 1234 (1985) (Celcom Petition, App. C at 38a). The Court of Appeals in affirming noted that the proposed issue was not raised before the Administrative Law Judge or in Celcom's exceptions to the Initial Decision, but rather was raised belatedly while the Commission was deliberating

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[3]LIN was at the time of the RBC acquisition by Metromedia an applicant for paging facilities in Philadelphia.

with respect to its final decision. (Celcom Petition, App. A at 6a). Celcom has advanced no satisfactory reason why it could not have made its "anti-competitive concerns" arguments at hearing based on the proposal for Metromedia to acquire RBC which was expressly set forth in AWACS' application and direct case. (AWACS Direct Case at Ex. 1).[4] The analysis by the Court of Appeals of the timing question does not constitute a "novel doctrine of administrative procedure," as charged by Celcom. (Celcom Petition at 3).

Moreover, Celcom has never adequately explained why, by its own reasoning, it did not attempt to raise an issue with respect to its "anti-competitive concerns" which, presumably, were implicit in the original partnership between LIN and RBC.[5] At the time the applications were filed RBC was an established Philadelphia paging company and LIN was a proposed market entrant. Celcom contends that the situation was different because RBC "had only a passive role in the management of AWACS." (Celcom Petition at 4). The record does not support that contention, but, assuming *arguendo,* that Metromedia was to enjoy a greater role in management than RBC, the Stock Agree-

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[4] Celcom characterizes this as an uncertain "planned" acquisition. In fact, the agreement in principle concerning the proposal was referenced in the AWACS application. The filing and grant of the application for Commission consent were reported by amendments to the AWACS application. The new ownership arrangement was a part of AWACS' proposal from the inception of the hearing, yet Celcom did not advance its anti-competitive allegations. In contrast, the types of "speculative" issues which the Commission has refused to add to hearings, Celcom Petition at 14-15, n. 15, have concerned collateral matters, not specific application proposals.

[5] Celcom concedes that the anti-competitive issue, if timely added, "had to be weighed in the comparative evaluation." (Celcom Petition at 5). Its failure to seek addition of the issue in a timely manner, an omission which it has never fully explained, deprived the tribunal of the opportunity to include this factor in the balancing process.

ment expressly provided that RBC would assume a full role if the announced sale to Metromedia was for any reason not consummated within a specified three-year period. Celcom would have it both ways. It defends its failure to raise the anti-competitive issue based upon the RBC/LIN relationship on the claimed ground that it presumed that the sale of RBC to Metromedia would be closed and RBC would not assume a full management role in AWACS. Yet, at the same time it did not need to raise its issue with respect to Metromedia and LIN because it could not presume that the sale would be consummated. The issue, if there ever was one, was there from the inception of the Philadelphia proceeding. In view of this history, it can easily be inferred that Celcom just did not conceive of raising the issue until it saw that it was not winning the case. It merely used the consummation of the Metromedia-RBC transaction as a pretext to attempt to reopen the record with further argument.

In sum, comparative hearings are by their nature predictive of future performance, and if Celcom wanted to marshall evidence bearing on the prediction of AWACS' performance it should have done so at the outset of the hearing, based on the clear ownership proposal set forth in AWACS' application.

Contrary to Celcom's assertions, there are no novel questions of law lurking in this case that would affect administrative law generally. Celcom's "Catch-22" argument (Celcom Petition at 12) does not serve as a basis for granting the writ. The requirement that litigants are to advance arguments in a timely fashion has long been a hallmark of both general civil and administrative law. Celcom's reasoning would require this Court to engage in myriad factual determinations as to the appropriate time for advancing new issues in administrative proceedings.

This question is best left to an initial determination by the administrative agencies, which are properly supervised by reviewing courts. The Court of Appeals was correct in affirming the Commission's ruling that Celcom had an obligation to come forward with its "theory" much earlier in this expedited proceeding on a timely basis. (Celcom Petition, App. A at 6a). In any event, this Court has accorded the Commission wide latitude in establishing its procedures, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), and Celcom's procedural argument raises no issue warranting this Court's review.

B. The Court of Appeals was correct in rejecting Celcom's contention that the Commission made its choice without meaningful consideration of its announced comparative criteria.

Contrary to Celcom's contentions, the Court of Appeals did not permit the Commission to depart unlawfully from its earlier formulated comparative criteria for deciding the top-thirty cellular cases. (Celcom Petition at 16-25). While the Commission refined its application of those criteria during its consideration of earlier cases, the issues on which the Commission's decision was based were basically the same issues originally designated as a result of its rule-making proceedings. The quality of market research was indeed critical to evaluation of those issues, but only insofar as it correlated with proposed cellular system design. The Commission noted specifically in affirming the Initial Decision that the Administrative Law Judge had

> found AWACS' market analysis more reliable than those of the other applicants and that AWACS used this information in designing a demand-based cellular system.[6]

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[6] *Final Decision* (Celcom Petition, App. C at 17a). The Commission stated that "[i]n contrast, the judge found Celcom's public need showing patently defective and its overall market study so inadequate as not to warrant comparative consideration." The Commission agreed. *(Id.* at 19a).

It found that AWACS "could best be relied upon for designing a cellular system responsive to the particular needs of the Philadelphia market." *(Id.* at 18a). With respect to "accommodation of demand," the Commission found that:

> The critical factor in this comparative issue is the demonstration of a nexus between the demand survey/market research conducted by the applicant and its cellular system design. The judge's conclusion that AWACS system design is based on the results of its market research is supported by the record and is reasonable.

(Id. at 22a). Again, with respect to the "expansion plan" criterion,[7] the Commission found that AWACS' market research had been translated into a "well-developed, market-specific expansion plan." *(Id.* at 28a). Without venturing further into the merits of the case, it may be seen that Celcom is fundamentally mistaken in its contention that the Commission's decision was based solely on an evaluation of market research without due regard to the proposed implementation of that research through system design. The basic decisional criteria employed by the Commission in this case were in fact those which it had announced in its rulemaking proceeding and specified in the Hearing Designation Order. On virtually all major issues, AWACS demonstrated the superiority of its proposal over those of the other applicants, including Celcom. The decision of the Court of Appeals affirming the Commission was clearly supported by the record.

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[7] Application of this criterion by the Commission had been affirmed by the Court of Appeals in the two lead cellular cases. *Cellular Mobile Systems of Illinois, Inc. v. FCC*, 782 F.2d 214 (D.C. Cir. 1985) (Chicago) and *Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182 (D.C. Cir. 1985) (Pittsburgh). Consequently, Celcom's excursion into this area of the decisional process presents nothing novel which would warrant grant of its petition.

The citation by the Court of Appeals to its decision in the Atlanta cellular case, *Celcom Communications Corp. of Georgia v. FCC,* 787 F.2d 609 (D.C. Cir. 1986) (Celcom Petition, App. F at 51a), properly and thoroughly disposed of Celcom's contention that the Commission had undercut its decisional criteria by permitting the eventual cellular licensees freedom to modify their proposals to respond to market conditions. The Commission has made reasoned decisions among competing applicants based on their proposals to provide service, but wisely has permitted its licensees a degree of latitude in implementing those proposals for this new service involving new technology. Celcom provides no basis, however, for its allegation that licensees are free to depart substantially from those aspects of their proposals relied upon by the Commission in awarding a license.

Celcom argues that the Commission's statements made generally with respect to the cellular hearing process and permissible changes in cellular systems had undercut the public interest benefit of the comparative process. (Celcom Petition at 18.) The Court of Appeals without specific discussion rejected this contention along with other issues raised by Celcom that had "already been resolved in previous cellular telephone appeals [footnote omitted] or otherwise are without merit." (Celcom Petition, App. A at 3a). In *Atlanta,* one of the cited cases, the Court of Appeals had expressly found that the Commission's allowance to cellular licensees of some flexibility in implementation of proposals was consistent with application of the cellular hearing criteria. *Celcom Communications Corp. of Georgia v. FCC,* 787 F.2d 609 (D.C. Cir. 1986) (Celcom Petition, App. F at 55a). While Celcom claims that it was unfairly prohibited from raising problems with the implementation of the hearing criteria, the Court of Appeals found that the implementation was consistent with the original rule making and that "Celcom's creative analysis, when fairly viewed, mischaracterizes the FCC's position." *Id.* (Celcom Petition, App. F at 54a).

This case is now five years old. Celcom has in fact been afforded the very review which it claims it was denied and it is merely unhappy with the proper evaluation and disposition of its claims. Inasmuch as Celcom did not (and indeed could not) show the Court of Appeals that the Commission had departed from its comparative criteria, its contention that the Court of Appeals should not have noted that Celcom could have complained about those criteria earlier is merely academic.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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